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Supreme Court of the United States

OCTOBER TERM—1929.

No. 428.

JAMES E. TYLER, JR., and WILLIAM G. TYLER, Administrators of the Estate of James E. Tyler, Deceased,
Petitioners,

against

THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF EDWARD H. BLANC AND RUSSELL L. BRADFORD, AS *AMICI CURIAE,* AND ON BEHALF OF THE CITY BANK FARMERS TRUST COMPANY.

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against
THE UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for City Bank Farmers Trust Company, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae.*

EDWARD H. BLANC,
RUSSELL L. BRADFORD,
Counsel for the City Bank Farmers Trust Company,
as *Amici Curiae.*

Supreme Court of the United States,

OCTOBER TERM—1929.

No. 428.

JAMES E. TYLER, JR., and WILLIAM G. TYLER, Administrators of the Estate of James E. Tyler, Deceased,
Petitioners,
against
THE UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF AMICI CURIAE.

This brief, by permission of the Court, and with the consent of the counsel for the respective parties, is filed by the undersigned as *amici curiae*, and on behalf of the City Bank Farmers Trust Company of New York as executor of estates wherein the question presented in this case is involved.

This case involves the question of whether the value of property in which the decedent had an estate by the entirety may be included as a part of the gross estate of the decedent for the purpose of the imposition of the Federal estate tax under Title II of the Revenue Act of 1916.

The facts in this case, and which are not disputed, are set out on pages 2 and 3 of the briefs for the petitioners. (See also R. 23). The tenancy by the entirety was cre-

ated on November 29th, 1917, and the decedent, James E. Tyler, died on May 7th, 1918.

The cases of *United States of America* v. *Provident Trust Company*, Docket No. 546, and *Commissioner of Internal Revenue* v. *Girard Trust Company* and *Joseph L. Woolston, Executors of the Estate of Beulah H. G. Woolston, Deceased*, Docket No. 547, are pending before this Court and are set down for argument immediately after the case in suit.

The arguments advanced herein in support of the contentions of the petitioners are likewise advanced in support of the contention of the respondents in the two above entitled cases.

Argument.

We shall address our observations in respect of our conception of the power of the Congress to impose an estate tax or death duty upon the value of property not transferred by the decedent at or by reason of his death, or the power to provide that the value of property not transferred at or by reason of death may be employed as a measure of a tax upon property so transferred, to the following points and in the following order:—

1. The tax laws of the United States should be applied consonantly with the laws of property of the several states.
2. The statute as sought to be applied to property held by the entirety is an unapportioned direct tax, and therefore unconstitutional.
3. The statute as applied is in violation of the Fifth Amendment of the Constitution.

The Federal estate tax is a death duty imposed upon the transfer at or by death of property owned by a decedent or in which he had a property interest at death. Death under any circumstances must be "the generating

source from which the particular taxing power takes its being". *Knowlton* v. *Moore*, 178 U. S. 41, 56 (1900).

The tax under the Federal Estate Tax Act of September 8th, 1916, as amended October 3rd, 1917, like the subsequent Federal Estate Tax Acts, is not a transfer, succession, legacy, inheritance, or gift tax, but is an *estate* tax. (*New York Trust Company* v. *Eisner*, 256 U. S. 345, [1921]; *Greiner* v. *Lewellyn*, 258 U. S. 384 [1922]; *Y. M. C. A. of Columbus* v. *Davis*, 264 U. S. 47 [1924]; *Edwards* v. *Slocum*, 264 U. S. 61 [1924]; *Nichols* v. *Coolidge*, 274 U. S. 531 [1927]; *Chase National Bank* v. *United States*, 278 U. S. 327 [1929]; *Reinecke* v. *Northern Trust Company*, 278 U. S. 339 [1929]). The occasion of the tax *is the transfer* of property at or by reason of death. (Sec. 201 of the Revenue Act of 1916 as amended).[1] The obligation for the payment of the tax is upon the decedent's personal representatives and is collectible from "the property of the decedent" (Secs. 207 and 208). The value of the property the transfer of which is subjected to the tax is the value thereof as of the date of death (Sec. 202).[2]

If the estate be insolvent the tax is not payable by or collectible from the surviving tenant by the entirety (See Secs. 208 and 209 and cf. *Nichols* v. *Coolidge*, supra, p. 542, and *Levy* v. *Wardell*, 258 U. S. 542 [1922] and *Frew* v. *Bowers*, 12 Fed. [2d] 625). If the estate be solvent it is liable for the full tax, including that imposed upon the value of the property seized by the entirety, or property transferred prior to death. (See *Farmers' Loan and Trust Company* v. *Winthrop*, 238 N. Y. 488, 496, certiorari denied 266 U. S. 633).

Such briefly is the framework of the statute. Under such a statute may the estate of the decedent be made to bear a tax measured not by the value of that estate only but by the value of property belonging to another *per tout et non per my* superimposed upon the value of the property of the estate, and a graduated tax applied to the

combined values? Even assuming (See *Nichols* v. *Coolidge*, supra, pp. 540-1) the tax is imposed upon the so-called transfer of the estate by the entirety, may the estate of the decedent be forced to bear the burden of a tax reckoned upon the value of such an estate by the entirety as of the date of death of one of the tenants, instead of the value at the date of acquisition or the date of the transfer to the tenants by the entirety. These preliminary questions involve the issue of whether there is a transfer at all at or by the death of one of the tenants by the entirety.

POINT I.

The tax laws of the United States should be applied consonantly with the laws of property of the several states.

We take it that Congress may not say that there has been a transfer of property upon the death of one tenant by the entirety if it be the settled law of property of the state of domicile of the tenant (or of the state where the property is located, if it be realty or tangible personalty), that there is no transfer. (*Clarke* v. *Clarke*, 178 U. S. 186 [1900]; *De Vaughn* v. *Hutchison*, 165 U. S. 566, 570 [1897]; *United States* v. *Title Insurance and Trust Company*, 265 U. S. 472, 486 [1924]; *Edward Hines Yellow Pine, Trustees*, v. *Martin, et al.*, 268 U. S. 458 [1925]).

In the *Edward Hines Yellow, etc.*, case, the Court, through Mr. Justice STONE said at p. 464:—

> "To avoid the uncertainty and injustice which result from 'the discordant element of a substantial right and which is protected in one set of courts and denied in the other, with no superior

---

1. See corresponding Sections of the Revenue Acts of 1918, 1921, 1924, 1926.
2. And corresponding Sections of the Acts of 1918, 1921, 1924 and 1926.

> to decide which is right' (*Brine* v. *Insurance Company*, 96 U. S. 627), this Court has not hesitated, when there has been a conflict of decision between it and the state courts affecting a rule of property within the State, to overrule its own decisions and to follow the state decisions, once it has become evident that they have established a 'rule of property' as the settled law of the State."

If there be no transfer under the law of Maryland upon the death of a tenant by the entirety to the surviving tenant or anyone else, an act of Congress may not create a transfer, or say that a transfer has occurred when there has been no property transferred. To do so would mean not only changing the law of property of a state in order to subserve the purposes of Federal revenue, but it would be in effect legislating a fact which otherwise by the law of property of the State is not a fact. (Cf. *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240 [1926]).

The Federal courts have given recognition to the property laws of the several states in the interpretation and application of Federal taxing statutes. (Cf. *United States* v. *Robbins*, 269 U. S. 315 [1926]; *Bender* v. *Pfaff*, C. C. A. Fifth Cir., Commerce Clearing House Standard Federal, Tax Service for 1930, Vol. III, p. 8380, unreported officially as yet; *Hopkins* v. *Bacon*, C. C. A., Fifth Circuit, ibid 8382. See also *Keith* v. *Johnson*, 271 U. S. 1.)

There is no transfer of property upon the death of a tenant by the entirety to the surviving tenant. That estates by the entirety exist in Maryland is adequately pointed out in the brief of counsel for the petitioners, is reflected in the opinion of the District Court in the case in suit (28 Fed. (2d) 887) and, we take it, is not disputable here.

POINT II.

The statute as sought to be applied to property held by the entirety is an unapportioned direct tax, and therefore unconstitutional.

If there be no transfer of property or a property right or property interest at or by death there can be no tax. As an excise the tax must fasten upon some excisable occasion. (*Knowlton* v. *Moore,* 178 U. S. 41). This Court, at p. 78, in speaking of death duties as a duty and not a direct tax, said:—

> "Of course, they concern the passing of property by death, *for if there was no property to transmit there would be nothing upon which the tax levied on the occasion of death could be computed.*" (Italics ours.)

Again, at p. 57:—

> "Confusion of thought may arise unless it be always remembered * * * that, fundamentally considered, *it is the power to transmit or the transmission or the receipt of property by death which is the subject levied upon by all death duties.*" (Italics ours.)

A transfer is a condition precedent to the tax. "The statute in terms taxes transfers." (*Chase National Bank* v. *United States,* 278 U. S. 327, 334 (1929)). If no property is transferred at the date of death there could be no tax, unless the statute be construed to tax the transfer made prior to death, which it can not be (*May* v. *Heiner,* decided April 14, 1930). Mere cessation of a property interest or right at death is not an excisable occasion unless there is at the same time a transfer of that property interest or an extinguishment of an exclusive power of disposition at that time. (*Reinecke* v. *Northern Trust Co.,* 278 U. S. 339 (as to five trusts); *Farmers' Loan and*

Trust Co. v. *Bowers*, 29 Fed. [2d] 14 (C. C. A. 2nd); *Hill* v. *Nichols*, 18 Fed. [2d] 139 (D. C. Mass.)). The lower courts, we respectfully submit, have misapprehended the language of this Court as employed in the *Chase National Bank* case, *supra*, wherein, at p. 334, it was said:—

> "Like provisions in earlier acts have been generally upheld as imposing a tax on the privilege of transferring the property of a decedent at death, measured by the value of the interest transferred *or which ceases at death.*" (Italics ours.)

This language, as we understand it, was not intended to hold that a mere cessation of a property right or interest, without a concurrent transfer thereof constituted a taxable occasion unless the cessation was of a power and control of disposition. This is quite obvious when we consider the purchase of an annuity for life, which property right or interest ceases at death, but which is transferred to no one. There is no tax upon such an occasion. From a reading of the language of this Court in the three above indicated cases, the Court had in mind the cessation of an interest or a right which was transferred at death, not to the mere extinguishment of an interest or right, for the Court says in one place that the tax is "on the privilege of transferring the property of a decedent at death * * *", (*Chase National Bank* case) and in another that "what was being imposed here was an excise upon the transfer of an estate * * *", (*Y. M. C. A.* case) and again "in its plan and scope the tax is one imposed on transfers at death or made in contemplation of death *and is measured by the value at death of the interest which is transferred.* * * * It is not a gift tax. * * * (*Reinecke* v. *Northern Trust Company*, 278 U. S. 339, 347 [1929]). (Italics ours.)

Therefore, when one speaks of the tax being sustainable upon the occasion of a cessation of a right or inter-

est in property it carries with it necessarily the signification that there is a transfer of the thing, interest or right of which there has been a cessation by the decedent or an extinguishment of a power of disposition, such as a power to revoke, etc.

Upon the death of one of the tenants of an estate by the entirety there is no transfer from the decedent to the surviving tenant or to anyone else. The surviving tenant has no more nor less property a moment after the death of the co-tenant by the entirety than was had a moment prior thereto. True, the veto power of the deceased tenant upon the disposition of the property no longer obtains. But this is not a transfer of a property right or a property interest, it is a mere extinguishment of the veto power. It rightfully cannot be said, with a proper recognition of the law in respect of estates by the entirety, that the uses or enjoyment of the property are transferred to the survivor, because under the law of the land the surviving tenant had all of those rights prior to the death of the co-tenant. That the surviving tenant upon the death of the co-tenant has a more valuable property than was had before does not constitute a transfer of *anything* from the deceased co-tenant to the surviving co-tenant, any more so than the expiration of a leasehold upon too low a rental reserved constitutes a transfer of the property to the landlord. The leasehold merely ceases to exist. At once the value of the property is enhanced because of the possibility of an increased rental or use of the property. The mere fact that the value of the property is increased by the extinguishment (not the transfer) of an interest or right in property, may not be held to be a taxable occasion if the tax is upon a transfer.

If we apply the last expression of this Court as employed in *Reinecke* v. *Northern Trust Company*, supra, that "the miscellaneous items of property required by

Section 402 [here Section 202] to be brought into the gross estate for the purposes of computing the tax" imposed by Section 401 (here Section 201) are transfers "in contemplation of death or property passing out of the control, possession or enjoyment of the decedent at his death", to the case in suit, it would seem clear that upon the death of one of the tenants of an estate held by the entirety, there can be no tax. (See *May* v. *Heiner*, supra.) True, the co-tenant dying had the enjoyment of the property, but so to an equal degree did the surviving tenant. "Control" must clearly mean exclusive control, a right of disposition (*Reinecke* v. *Northern Trust Co.*, supra); *Farmers' Loan and Trust Co.* (*Astor trusts*) v. *Bowers*, 29 Fed. [2d] 14 (1928). This the decedent did not have.

Therefore, we may say there has been no transfer at death of any property or property right; and if there be no transfer there can be no tax. (*Matter of Lansing*, 182 N. Y. 238 (1905). It must follow then that the tax is upon the transfer that occurred prior to death. But this is not a gift tax nor a tax upon *inter vivos* transfers. There was no tax upon the transfer at the time of the transfer. The statute does not contemplate a tax upon the value of the property transferred as of the time of the transfer. No return is required of such a transfer unless death shall occur. The values, used to admeasure the tax and determine the rate are not those at the time of the transfer. They are the values at death which may be a hundredfold those at the time of the transfer. (*Nichols* v. *Coolidge*, supra; *Frew* v. *Bowers*, supra.) It contemplates, and its provisions are specific, a tax upon a transfer at death and a collection of the tax from the estate of the decedent. The property retained and continued to be held by the surviving tenant by the entirety is not a part of the estate of the decedent.

The tax then is of what kind? If it be collected, as the Government has sought to collect it, from the estate

of the decedent, it is a direct tax upon the estate of the decedent and ultimately upon the recipients of his bounty under his Will or his heirs and distributees.

The decedent having once made the transfer of the property to himself and wife as tenants by the entirety is helpless to undo the transfer. The property is irrevocably transferred. It is not subject to any power of disposition by him nor is it subject to his individual debts or obligations. It belongs to someone else by the whole and not by the moiety. Nor is the transfer incomplete until death, or subject to change by the transferror. The thing that was transferred was in fact and in law transferred prior to death, and the tax is on the transfer of the corpus or principal and not upon the life use. But even so, here the life use also had been transferred to another, as much so as it had been retained.

If there be no transfer at or by death *of the whole* of the property, the *value of which whole* has been the basis of the tax, then the tax is a direct tax, within the provisions of Section 2, Clause 3, and Section 9, Clause 4, of Article I of the Constitution of the United States as those sections have been construed by the Courts. It is a direct tax upon the estate of the decedent because of the former ownership of the property by the decedent, and not because there was a transfer of the property to the estate of the decedent or to any one else at his death; or the statute imposes a direct tax upon the surviving tenant or the property of the surviving tenant solely because of the ownership thereof. This, this Court has said in *Pollock* v. *The Farmers' Loan and Trust Company*, 157 U. S. 429, 158 U. S. 601, may not be done. It again said in *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 294 (1921), through Mr. Justice Brandeis, that "to levy a tax by reason of ownership of the property is to tax the property". In that case the tax was upon the right of removal of whiskey from bonded warehouses where the

law required it to be stored, and this Court held that to tax this right was to tax the property itself.

True, the Congress has a right to impose a tax upon this property or upon the value thereof but unless that tax is apportioned in accordance with the provisions of the Constitution it is an invalid imposition. True, likewise, the Congress may impose a tax upon the transfer by the original transferror (*Bromley* v. *McCaughn*, 280 U. S. 124), but this would be a gift tax. But we venture the opinion that the tax would be unconstitutional if the measure thereof (the value) was the value of the property five, ten or twenty years thereafter, to be collected when the donor died, from his estate. Such a law in effect would be an embargo or prohibition against alienation of property, and would be so whimsical and capricious as to offend against the Fifth Amendment. (That the statute in suit likewise is offensive to the Fifth Amendment will be referred to in another point in this brief).

If the estate of the decedent were insolvent there would be no tax, and if one were sought to be collected it would fall upon the surviving tenant by the entirety, or the property of such surviving tenant, and thus would be a tax, (if there be no transfer at death) upon that surviving tenant solely because of ownership thereof. If the estate be solvent, the tax will fall not upon the surviving tenant or the owner of the property, but will fall upon the estate of the decedent and would be a direct tax within the purview of the Constitution of the United States in that it would be a tax upon the estate by reason of the former ownership of the property by the decedent, or it would be a tax upon the estate of the decedent by reason of the ownership of property by another or third party, the value of which is sought to be taxed, to the estate of the decedent. In either case, or from any angle from which the incidence of the tax is viewed, its impact is direct, unavoidable, constitutes an absolute demand, and has its

basis only in the ownership of property and not the transfer thereof.

A stamp tax imposed by a state upon Federal bonds is a direct tax upon Federal bonds (*McCulloch* v. *Maryland*, 4 Wheat. 316 (1819)). A state tax upon the occupation of an importer is a tax upon imports. (*Brown* v. *Maryland*, 25 U. S. (12 Wheat.) 419 (1827)). A state tax upon charter parties or insurance policies or ships' manifests is a tax upon exports. (*U. S.* v. *Hvoslef*, 237 U. S. 1 (1915); *Thames etc. Insurance Co.* v. *United States*, 237 U. S. 19 (1915); *N. Y. etc. S. S. Co.* v. *United States*, 125 Fed. 320 (1903). Congress may not regulate by means of taxation what it may not control directly by regulatory statutes. (*Child Labor Cases, Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20 (1922)); *Hill* v. *Wallace*, 259, U. S. 44 (1922); *Trusler* v. *Crooks*, 269 U. S. 475 (1926)). A tax upon a bill of lading is a tax upon the article it represents. (*Almy* v. *California*, 65 U. S. (24 How.) 169 (1861)).

The decision of the lower court (Parker, J.,) meets the issue full face, and notwithstanding the settled law in Maryland that there is no transfer, states in the following language at p. 726 that there is a transfer at death:—

> "If the parties should be divorced the estate would be dissolved and neither would succeed to the whole property even if he should survive. Upon the death of one of the parties, however, all of his rights in the property are by operation of law transferred to the other so as to create a sole and unconditional estate therein. To *deny that there is a transfer of property in such case resulting from death is to lose the substance of legal rights while grasping at the shadow.*" (Italics ours.)

The reasoning of the Court below has plausibility but it necessarily carries with it its own refutation, because if the decedent had all of the things to which the Court

refers the survivor likewise had the same things, and the decedent had no right or property interest larger than that of the survivor. The lower Court's argument ignores completely the rights of the survivor and assumes all of the property belongs exclusively to the decedent, and that all of the property rights are transferred by the decedent. An analysis of the Court's argument is an answer to the Court's conclusion. *A fortiori,* if the Court's reasoning be correct, it carries inevitably the conclusion that the property right transferred at death was a right having a lesser value than the whole. Whether that value be one-half or less or more it nevertheless was not the whole. Yet the Court permits the whole value of the whole property held by the entirety to be included as a part of the gross estate, and the tax imposed thereon to be exacted from not the owner of that property, but from the estate *per se* of the decedent. This is tantamount to saying that "A" may be required to pay a tax based upon the value of "B's" property; or that "A" may be required to pay a tax because "B" is the owner of property (*Knowlton* v. *Moore,* supra, p. 76).

We submit with full deference that the Court below in viewing the elements and incidence that go to make up and constitute an estate by the entirety has viewed with an eye full to only one element or one interest and has blinded itself to the significance of the elements and interests of property necessarily inhering in the co-tenant.

The issue between the Circuit Court of Appeals and the District Court is sharp and direct. The District Court, familiar with the settled law in Maryland, definitely held that upon the death of a co-tenant by the entirety nothing of property was transferred. The Circuit Court of Appeals, ignoring the rule of law obtaining in the State of Maryland, by judicial fiat says there was a transfer by reason of and at the death of one of the co-tenants by the entirety. If there was in fact a transfer

there is a taxable occasion. If there is a taxable occasion the tax may be measured only by the value of the property transferred. If the whole of the property was not transferred at death the tax is invalid in so far as it is applied to the whole. If the transfer did not occur at death but occurred prior thereto, then a death duty is not imposable because, as Chief Justice White said in *Knowlton* v. *Moore,* supra (p. 56) the generating source from which the taxing power takes its being is death.

POINT III.

The statute as applied is in violation of the Fifth Amendment of the Constitution.

The tax is imposed by and, as was said by Mr. Justice Stone in *Reinecke* v. *Northern Trust Company,* supra, the only imposing section is, Section 201. This section imposes a tax "upon the transfer of the net estate of every decedent dying after the passage of" the Act. The tax is collectible from the executor or administrator of the estate or from the property of the decedent (Sections 207 and 208). To bring within the effective ambit of Section 201 "the miscellaneous items of property required by Section 202 to be brought into the gross estate for computing the tax" there must be a transfer of the property described in the particular miscellaneous item at or by the death of the decedent. To say that there is a taxable occasion upon the death of one tenant by the entirety is merely to beg the question. Under the settled law of property in Maryland there is not a transfer. The Circuit Court of Appeals below disregarding the law in Maryland has held there is a transfer. The Court arrives at this conclusion not by resort to the law of Maryland, nor by a technical consideration of the law applying to es-

tates by the entirety, but upon what is announced as practical grounds that the "surviving spouse receives an enlargement of his interest in the property in the one case just as the heir receives an interest in the property in the other." An heir, of course, has no enjoyment or use of property until the death of the owner. This simply is not true in the case of an estate by the entirety for there the surviving tenant has had prior to death all of the uses and enjoyment as much so as the decedent. The Court says at p. 726:—

> "We think, however, that this gives too narrow a meaning to 'transfer' and ascribes too much importance to what are pure fictions of the law. It is true that husband and wife are said to be seized of the estate by entireties '*per tout et non per my*', that is to say, each during their joint lives is deemed seized of the whole estate and not of the moiety thereof; and it is true that, upon the death of one, the survivor is said to take no new interest because originally vested with the entirety. But these doctrines are pure fictions based upon the fiction of the unity of husband and wife. *Marburg* v. *Cole*, 49 Md. 402, 33 Am. Rep. 266; *Ades* v. *Caplan*, 132 Md. 66, 103 A. 94, L. R. A. 1918D, 276. As a matter of fact, husband and wife are not one person but two persons, and neither has absolute right in or control over the property so long as the other lives. Only upon the death of one does the other acquire absolute ownership with the right to sole and unrestricted use and possession and the right to alien and convey. Whatever form of technical expression be used, therefore, and whatever sophistries indulged, the fact remains that, upon the death of one of the parties, the survivor by operation of law *succeeds to the interest which* the decedent had in the property." (Italics ours).

But does the survivor, either in fact or in law, *succeed* to the "interest which the decedent had in the property"? The survivor already had the whole, subject only to an adverse veto power as to disposition.

Is not the correct interpretation of what happens that the interest of the decedent is extinguished—obliterated—without the transfer of anything?

The property involved in suit was conveyed in 1917 by the decedent to himself and wife as tenants by the entirety. He died in 1918. There was a transfer in 1917 prior to his death to his wife as much as there was a transfer to himself or a reservation to himself. When the Court undertakes to ignore and disregard the technicalities of an estate by the entirety, and the fiction of the unity of husband and wife, in order to arrive at the conclusion that upon the death of the husband the property is transferred, the Court by the same token and reasoning ignores and disregards while invoking the fiction of the unity of husband and wife the interests of the wife in the transfer to her in 1917.

If the husband could not have disposed of, sold, aliened or conveyed the property during the joint lives of the spouses, the transfer in 1917 was irrevocable as to him. If it were necessary for him to obtain the consent to the subsequent transfer or other disposition of the property transferred, of "one entitled to the beneficial, and consequently adverse, interest, * * *" the transfer "for all practical purposes had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute." (*Reinecke* v. *Northern Trust Company*, supra, (p. 346)).

The absence of the power of disposition or of control in respect of disposition renders inapplicable the decision in *Chase National Bank* v. *United States*, supra. There "the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he himself were the beneficiary of them." This is not so in the case in suit.

The Court below in applying the Chase National Bank decision stated that (p. 726)

> "The contention was made there, as here, that the interest of the beneficiary had vested prior to the death of an insured, and that consequently there was no transfer to be taxed, but the Court held that the policies should be included."

There is a patent and obvious distinction between the vesting of the property in a tenant by the entirety which is subject to no power of revocation nor of disposition, and the vesting of a life insurance policy by a transfer, where there is a reservation of the right to change the beneficiary. In the one case the right of each tenant by the entirety is irrevocably vested subject only to a condition subsequent which is not under the control or power of the decedent, and in the other the beneficiary of the policy has no irrevocable and indefeasible rights until the death of the insured as against the decedent. In the one case the grantor has no power of disposition, in the other such a power remains until death. At the moment of death the insured could in the latter case have changed the beneficiary or wholly have disposed of the property. As this Court said in the *Chase National Bank* case, supra:—

> "The precise question presented is whether the termination at death of that power and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax, as is true of the termination by death of any of the other legal incidents of property through which its use or economic enjoyment may be controlled."

In answering the question thus presented the Court said (p. 338):—

> "*Termination of the power of control* at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax." (Italics ours.)

The distinction between the *Chase* case and the case in suit is definite and wide.

In the case in suit the exercise or non-exercise of a power of disposition was impotent. In the *Chase* case it was of the essence. No economic benefit shifted upon the death of the tenant by the entirety, because from the original creation of the tenancy the survivor had the full and undisputed enjoyment of all the usufruct and elements of property, and by death had no more than she had before, except that there was an end of a veto power upon the disposition of the property. The power of disposition or control in respect of disposition in the decedent was restricted and limited by the necessity of the consent of the co-tenant by the entirety. This being so, the transfer of the property itself, the value of which is the subject of the tax, was beyond the power of the decedent to control. (See *Reinecke* v. *Northern Trust Company,* supra; *The Farmers' Loan and Trust Company, as Trustee of Astor trust* v. *Bowers,* 29 Fed. [2d] 14).

If it be true, and under the settled law of Maryland it is true, that upon death there is no transfer of the whole of the property, then the question resolves itself into whether the original transfer in 1917 may be in 1918 subjected to a tax because that transfer was of the class described in "the miscellaneous items" included in Sec-

tion 202 of the statute. The Government argues that this may be done because such a transfer is testamentary in character and is thus reasonably related to the thing taxed, and that it is necessary to set up this artificial entity as the measure of the tax, and include therein designated classes of property, in order that certain dispositions of property made by decedent during his lifetime, but actually testamentary so far as their ultimate effect is concerned, may be reached. The Government with bold consistency contends that the inclusion of estates by the entirety in the taxable net estate is necessary to prevent tax avoidance and that the tax may be sustained as a necessary adjunct to the taxation of testamentary transfers, "even if standing alone its constitutionality might have been subject to doubt." (See brief, pp. 546-547).

Does not the Government argue too much? "One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax. * * * *Reinecke* v. *Northern Trust Co.*, supra, (p. 347)". If the property has been transferred prior to death it may be considered as testamentary in character, only if in fact it is testamentary, that is to say, there is a shifting of the economic benefits, *and of those economic benefits that are the subject of this tax.*

The United States Circuit Court of Appeals for the Second Circuit in *Frew* v. *Bowers*, 12 Fed. [2d] 625, (and in which case the Government confessed error after the decision of *Nichols* v. *Coolidge*, 274 U. S. 531) held that a transfer made prior to the enactment of the Revenue Act of 1918 upon which transfer there was a reservation of the income during the life of the grantor was not subject to the Federal estate tax. This was held to be so notwithstanding that the full beneficial enjoyment of the property passed at the date of the death of the decedent. Now if the incidence of the tax is upon the transfer of the beneficial enjoyment, no question of retroactivity of the

statute was involved in that case. (See also *Reed* v. *Howbert*, 8 Fed. (2d) 641 and *Cleveland Trust Company* v. *Routzhan*, 22 Fed. (2nd) 1009). The same situation presented in these cases was presented to this Court in *Reinecke* v. *Northern Trust Company*, with the exception that in addition to the reservation of the income or usufruct there was also a reservation of a power to revoke. When this power of control and disposition was reserved to the transferror this Court held the tax was properly imposed. The necessary conclusion from the different results of the different cases is that the basis of the holding in the *Reinecke* decision was upon the ground that there was up to the moment of death a power of control, and of disposition of the principal of the transfer, which is the taxable commodity.

In the concurring opinion of Learned Hand, Circuit Judge, in *Frew* v. *Bowers*, he says, at p. 630:—

> "And so I am not prepared to say, if section 402(c) had merely included in Mr. Nash's estate the property which he conveyed to the trustees in 1910, at the value it *then* had, that it would not have been valid." [Subsequently this Court in *Nichols* v. *Coolidge*, supra, and again in *Untermeyer* v. *Anderson*, 276 U. S. 440, held that such a tax would have been invalid]. "But it does not do that. In substance it imposes a tax upon the settlor, measured by the value of property *at his death*, over *which he has parted with all control*, perhaps, as here, long since. As to transfers made after the law went into effect I have nothing to say; one may insist that settlors take their chances. But as to those made before the law was passed it appears to me that the result is too whimsical to stand. There are settlements which the settlor outlives for 30 or 40 years. There is no limit to the increase in the value of land, for example, in such a period; it may easily be fiftyfold and the tax leave the settlor destitute when he dies. * * * Such a tax is fixed by the mere sport of fortune. It has no more relation to the possessions or conduct of the taxpayer than if he were taxed upon the

subsequent value of property he had sold outright, or his estate was doubled because he died on Wednesday. *Such a law is far more capricious than merely retroactive taxes.* Those do indeed impose unexpected burdens, but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grievous injustice.

But it is answered that this result goes only to the equal assessment of the tax and must rest upon the Fifth Amendment, which does not apply to federal taxation. I quite agree that the Supreme Court has in many cases implied or said as much. * * * If the rule is to be taken unconditionally, taxpayers may be selected by lot and assessments may vary with the price of wheat. Perhaps it would have been necessary to go so far, had it not been for the opinions in *Brushaber* v. *U. S.*, supra, 24, 25 (36 S. Ct. 236), and *Barclay & Co.* v. *Edwards*, 267 U. S. 442, 450, 45 S. Ct. 135, 348, 69 L. Ed. 703, and the strong intimations in Lewellyn *v.* Frick, 268 U. S. 238, 251, 252, 45 S. Ct. 487, 69 L. Ed. 934. But these make it clear that the power is not utterly absolute. A tax may be so 'arbitrary and capricious.' its 'inequality' so 'gross and patent,' that it will not stand, and as I can think of no other pertinent constitutional limitation, but the Fifth Amendment, it seems to me that the rule is not as stark as the defendant argues. If there be any limit whatever, I own I cannot, except in fancy, think of a case more plainly beyond it than this." (Italics ours).

In so far as the statute imposes the tax upon the value of property that is transferred at or by reason of death its propriety is unassailable. But the effect and force of the statute becomes vicious when it attempts to impose a tax upon property irrevocably transferred long prior to the death of the decedent, or undertakes to impose a tax upon the estate and to employ, as a measure of that tax, the value of property belonging to another or already beyond the power of the decedent to transfer. This

is in part the basis of the decision of this Court in *Nichols* v. *Coolidge*, supra, for this Court said on February 24th of this year in *Cooper* v. *United States*, 74 L. Ed. 314, 315, in speaking of the *Coolidge* decision that

> "*Nichols* v. *Coolidge*, supra, held arbitrary and capricious a statute which required executors to pay an excise ostensibly laid upon the transfer of property by death, but *reckoned upon its value plus the value of other property conveyed by the decedent before the enactment in entire good faith* and without *contemplation of death*, and said that to enforce it would amount to confiscation." (Italics ours).

It is difficult to conceive of a more capricious or arbitrary tax than one upon the value of property transferred *per tout et non per my* prior to death at the value of that property at the death of one of the co-tenants and the executor of the estate of the decedent required to pay that tax which is reckoned upon the value of the property of the decedent plus the property with which the executor has no concern, may never administer, and which is not subject to the debts or obligations of the decedent, and which is wholly beyond his power of control or disposition. But the Government contends this is necessary to prevent avoidance of taxes, even though "standing alone its constitutionality may have been subject to "doubt." "Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity". *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240.

If a tax attempted to be imposed upon the death of one of the tenants by the entirety as though upon a transfer when the settled law of the state is that there is no transfer, may be, as the Government admits, of doubtful constitutionality, provided it is not a part of the Federal estate tax, and this property is sought to be used as a measure for the tax upon something else, "it would open the way for easily doing indirectly what is forbidden to be done di-

rectly and would render important constitutional limitations of no avail." *Frick* v. *Pennsylvania*, 268 U. S. 473, 495.

This Court has repeatedly held that the Congress may not do indirectly what it may not do directly, and that it is a violation of due process of law as guaranteed by the Constitution of the United States if the thing that may not be taxed is indirectly brought into the penumbra of things that may be taxed. For as this Court said in *Frick* v. *Pennsylvania*, (p. 494):—

> "Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the state had power to tax and what it had no power to tax and which necessarily operated to make the amount of the tax just what it would have been if the state's power had included what was excluded by the Constitution. This ground, in our opinion, is not tenable."

Of course the Congress may impose a tax upon an estate by the entirety, or upon the occasion of the death of one of the tenants by the entirety, or upon both tenants by the entirety, but such a tax must be apportioned in accordance with the provisions of the Constitution of the United States for direct taxes. If the tax be unapportioned then it must fall upon some excisable occasion, and must fasten upon the property the subject of the excise. If the property in suit sought to be taxed is not in fact or in law a part of the estate of this decedent (and it is not) then the imposition is a taking of the property of the estate without due process of law and a taking of the property of the legatees and devisees under the Will of this decedent for public uses without just compensation both in violation of the Fifth Amendment of the Constitution of the United States. If the death of the decedent occasions a transfer then obviously an excise may properly be imposed. But this excise may be measured only by the value of the property that is transferred. If

this value be the whole of the property, the contention of the Government is correct. If it be less than the whole then the statute is unconstitutional. If there be no transfer as of the moment of death and the tax is construed to be upon the transfer prior thereto, then to measure the tax by the value of the property as of the date of death, and of that value superimposed upon the value of property belonging to the decedent, the imposition is too whimsical to stand. Such a tax is not taxation at all but confiscation. "Arbitrary selection, it has been held, cannot be justified by calling it classification" (*Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 417).

In *May* v. *Heiner*, decided by this court on April 14, 1930, it was held that a transfer made in 1917 by a person who died in 1920, which transfer was upon trust to pay the income therefrom to her husband during his life, and after his decease to the grantor during her life, and upon her death the remainder or corpus to her four children, etc., was not subject to the Federal estate tax. This court said in respect of the facts:

> "The record fails clearly to disclose whether or not Mrs. May survived her husband. Apparently she did not. *But this is not of special importance since the refund should have been allowed in either event.*" (Italics ours.)

And again:

> "It was not testamentary in character and was beyond recall by the decedent. *At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event.*" (Italics ours.)

So, too, is such interest as the decedent-tenant in suit had prior to death "obliterated" by death, and nothing of property interest "passed from him to the living".

The argument of the Government that such estates should be taxed, though not otherwise constitutionally subject to an excise, in order to prevent avoidance of the Federal estate tax is one of ingenuity rather than logic. But could such estates be availed of in any practical sense or appreciable extent to that end? To assume so tests credulity. But the statute does more. It taxes the whole of the estate by the entirety even though it was not created by either of the tenants, but was acquired by gift, devise or bequest. And the later statutes tax the half of such estates even though received by gift, bequest or devise from another. Both the framework of the statute and a normal recognition of the probabilities negative the reason and deny the hypothesis.

POINT IV.

The decision of the United States Circuit Court of Appeals for the Fourth Circuit, should be reversed.

Respectfully Submitted,

EDWARD H. BLANC,
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Amici Curiae.